

1 Plaintiff Elaine Wang (“Plaintiff”), by her attorneys, makes the following allegations
2 against Aquantia Corp. (“Aquantia” or the “Company”) and the members of the board of directors
3 of Aquantia (the “Board” or “Individual Defendants,” along with Aquantia, collectively referred
4 to as the “Defendants”), for their violations of Sections 14(a) and 20(a) of the Securities
5 Exchange Act of 1934 (the “Exchange Act”), 15 U.S.C. §§ 78n(a), 78t(a), SEC Rule 14a-9, 17
6 C.F.R. 240.14a-9, and Regulation G, 17 C.F.R. § 244.100 in connection with the proposed merger
7 (the “Proposed Transaction”) between Aquantia and affiliates of Marvell Technology Group Ltd.
8 (“Marvell”). The allegations in this complaint are based on the personal knowledge of Plaintiff as
9 to herself and on information and belief (including the investigation of counsel and review of
10 publicly available information) as to all other matters stated herein.

11 **INTRODUCTION**

12 1. This is an action brought by Plaintiff to enjoin the Proposed Transaction whereby
13 Antigua Acquisition Corp., a wholly owned subsidiary of Marvell (“Merger Sub”) will merge
14 with and into Aquantia, with Aquantia continuing as the surviving corporation in the Proposed
15 Transaction and a wholly owned subsidiary of Marvell, for \$13.25 in cash for each Aquantia
16 share owned (the “Merger Consideration”). The Board has unanimously recommended to the
17 Company’s stockholders that they vote for the Proposed Transaction.

18 2. To convince Aquantia stockholders to vote in favor of the Proposed Transaction, on
19 May 29, 2019, the Board authorized the filing of a materially incomplete and misleading
20 Preliminary Proxy Statement on Schedule 14A (the “Proxy”) with the Securities and Exchange
21 Commission (“SEC”). The Proxy violates Sections 14(a) and 20(a) of the Exchange Act by
22 noncompliance with Regulation G and SEC Rule 14a-9 (17 C.F.R. § 244.100 and 17 C.F.R.
23 § 240.14a-9, respectively).

24 3. Defendants have failed to disclose certain material information necessary for
25 Aquantia stockholders to properly assess the fairness of the Proposed Transaction, thereby
26 violating SEC rules and regulations and rendering certain statements in the Proxy materially
27 incomplete and misleading.

1 SANTA CLARA, Calif. and SAN JOSE, Calif., May 6, 2019 /PRNewswire/ --
2 Marvell Technology Group Ltd. (NASDAQ: MRVL), a leader in infrastructure
3 semiconductor solutions, and Aquantia, Corp. (NYSE: AQ), a leader in Multi-Gig
4 Ethernet connectivity, today announced a definitive agreement, approved by the
5 boards of directors of both companies, under which Marvell will acquire all
outstanding shares of Aquantia common stock in exchange for consideration of
\$13.25 per share in cash.

6 The acquisition of Aquantia complements Marvell's portfolio of copper and
7 optical physical layer product offerings and extends its position in the Multi-Gig
8 2.5G/5G/10G Ethernet segments. In particular, Aquantia's innovative Multi-gig
9 automotive PHYs, coupled with Marvell's industry-leading gigabit PHY and
10 secure switch products, creates the broadest and most advanced range of high-
speed in-car networking solutions in the world. This unique combination
accelerates Marvell's vision for the future of automotive networking with speeds
necessary to enable level 4 and 5 autonomous driving.

11 As the automotive industry increasingly adopts Ethernet in-vehicle networks for
12 mainstream models, the number of related ports is expected to grow dramatically
13 at a 62% annualized growth trajectory, from 53 million in 2018 to 367 million by
14 2022.

15 "Our acquisition of Aquantia will fuel Marvell's leadership in the transformation
16 of the in-car network to high-speed Ethernet over the next decade," said Matt
17 Murphy, president and CEO of Marvell. "At the same time, Aquantia extends our
reach in the rapidly emerging Multi-Gig segment of network infrastructure and
creates a leading end-to-end Ethernet connectivity portfolio."

18 "Marvell and Aquantia share a vision where the network – whether in an
19 autonomous vehicle, an enterprise application or in cloud infrastructure – can
20 seamlessly power the data economy," said Faraj Aalaei, chairman and CEO of
21 Aquantia. "This is a fantastic opportunity as our customers will benefit from
Marvell's global scale and expanding footprint in Multi-Gig network
applications."

22 The transaction is expected to be immediately accretive to Marvell's non-GAAP
23 earnings per share and generate significant annual run-rate synergies of \$40
24 million to be realized within 12 months after the transaction closes.

25 **Transaction Structure and Terms**

26 Under the terms of the definitive agreement, Marvell will pay Aquantia's
27 stockholders \$13.25 per share in cash. This represents approximately \$452
28 million in transaction value after adjusting for net cash on Aquantia's balance
sheet. Marvell intends to finance the transaction with cash on hand and revolver

1 borrowings. The transaction is not subject to any financing condition and is
 2 expected to close by the end of CY2019, subject to regulatory approval as well as
 3 other customary closing conditions, including the adoption by Aquantia's
 stockholders of the merger agreement.

4 In connection with the execution of the definitive agreement, certain stockholders
 5 of Aquantia, together holding approximately 17 percent of the outstanding shares
 6 of common stock of Aquantia, have agreed to vote their shares in favor of the
 transaction under a voting and support agreement.

7 ***The Materially Misleading and Incomplete Solicitation Statement***

8 23. On May 29, 2019, Defendants caused the Proxy to be filed with the SEC in
 9 connection with the Proposed Transaction. The Proxy solicits the Company's shareholders to vote
 10 in favor of the Proposed Transaction. Defendants were obligated to carefully review the Proxy
 11 before it was filed with the SEC and disseminated to the Company's shareholders to ensure that it
 12 did not contain any material misrepresentations or omissions. However, the Proxy misrepresents
 13 and/or omits material information that is necessary for the Company's shareholders to make an
 14 informed decision concerning whether to vote in favor of the Proposed Transaction, in violation
 15 of Sections 14(a) and 20(a) of the Exchange Act.

16 ***Financial Forecasts***

17 24. The Proxy fails to provide material information concerning the Company's
 18 financial forecasts, which were developed by the Company's management and relied upon by the
 19 Board in recommending that the shareholders vote in favor of the Proposed Transaction. Proxy at
 20 40. These financial forecasts were also relied upon by the Company's financial advisor, Barclays,
 21 in rendering its fairness opinions.

22 25. With respect to the Projections, the Proxy discloses the values and definitions of
 23 certain financial metrics, including NOPAT, EBITDAS, and Unlevered Free Cash Flow, but fails
 24 to provide: (i) the value of certain line items used to calculate these non-GAAP measures, or (ii) a
 25 reconciliation to their most comparable GAAP measures, in direct violation of Regulation G and
 26 consequently Section 14(a). Proxy at 42-43.

27 26. The SEC has indicated that if the most directly comparable GAAP measure is not
 28

1 accessible on a forward-looking basis, the company must disclose that fact, provide any
 2 reconciling information that is available without unreasonable effort, identify any unavailable
 3 information and disclose the probable significance of that information. A company is permitted to
 4 provide the projected non-GAAP measure, omit the quantitative reconciliation and qualitatively
 5 explain the types of gains, losses, revenues or expenses that would need to be added to or
 6 subtracted from the non-GAAP measure to arrive at the most directly comparable GAAP
 7 measure, without attempting to quantify all those items.

8 27. When a company discloses non-GAAP financial measures in a registration
 9 statement that were relied on by a board of directors to recommend that shareholders exercise
 10 their corporate suffrage rights in a particular manner, the company must, pursuant to SEC
 11 regulatory mandates, also disclose all forecasts and information necessary to make the non-GAAP
 12 measures not misleading, and must provide a reconciliation (by schedule or other clearly
 13 understandable method) of the differences between the non-GAAP financial measure disclosed or
 14 released with the most comparable financial measure or measures calculated and presented in
 15 accordance with GAAP. 17 C.F.R. § 244.100.

16 28. Indeed, the SEC has increased its scrutiny of the use of non-GAAP financial
 17 measures in communications with shareholders. Former SEC Chairwoman Mary Jo White has
 18 stated that the frequent use by publicly traded companies of unique company-specific, non-GAAP
 19 financial measures (as Aquantia included in the Proxy here), implicates the centerpiece of the
 20 SEC's disclosures regime:

21 In too many cases, the non-GAAP information, which is meant to supplement the
 22 GAAP information, has become the key message to investors, crowding out and
 23 effectively supplanting the GAAP presentation. Jim Schnurr, our Chief
 24 Accountant, Mark Kronforst, our Chief Accountant in the Division of Corporation
 25 Finance and I, along with other members of the staff, have spoken out frequently
 26 about our concerns to raise the awareness of boards, management and investors.
 27 And last month, the staff issued guidance addressing a number of troublesome
 28 practices *which can make non-GAAP disclosures misleading*: the lack of equal or
 greater prominence for GAAP measures; exclusion of normal, recurring cash
 operating expenses; individually tailored non-GAAP revenues; lack of consistency;
 cherry-picking; and the use of cash per share data. I strongly urge companies to
 carefully consider this guidance and revisit their approach to non-GAAP

disclosures. I also urge again, as I did last December, that appropriate controls be considered and that audit committees carefully oversee their company's use of non-GAAP measures and disclosures.¹

29. The SEC has repeatedly emphasized that disclosure of non-GAAP forecasts can be inherently misleading and has therefore heightened its scrutiny of the use of such forecasts.² Indeed, the SEC's Division of Corporation Finance released a new and updated Compliance and Disclosure Interpretation ("C&DI") on the use of non-GAAP financial measures to clarify the extremely narrow and limited circumstances, known as the business combination exemption, where Regulation G would not apply.³

30. More importantly, the C&DI clarifies when the business combination exemption does not apply:

There is an exemption from Regulation G and Item 10(e) of Regulation S-K for non-GAAP financial measures disclosed in communications subject to Securities Act Rule 425 and Exchange Act Rules 14a-12 and 14d-2(b)(2); it is also intended to apply to communications subject to Exchange Act Rule 14d-9(a)(2). This exemption does not extend beyond such communications. Consequently, if the same non-GAAP financial measure that was included in a communication filed under one of those rules is also disclosed in a Securities Act registration statement, proxy statement, or tender offer statement, this exemption from Regulation G and Item 10(e) of Regulation S-K would not be available for that non-GAAP financial measure.

Id.

¹ Mary Jo White, *Keynote Address, International Corporate Governance Network Annual Conference: Focusing the Lens of Disclosure to Set the Path Forward on Board Diversity, Non-GAAP, and Sustainability* (June 27, 2016), <https://www.sec.gov/news/speech/chair-white-icgn-speech.html> (last visited Mar. 7, 2019) (emphasis added).

² See, e.g., Nicolas Grabar and Sandra Flow, *Non-GAAP Financial Measures: The SEC's Evolving Views*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION (June 24, 2016), <https://corpgov.law.harvard.edu/2016/06/24/non-gaap-financial-measures-the-secs-evolving-views/> (last visited Mar. 7, 2019); Gretchen Morgenson, *Fantasy Math Is Helping Companies Spin Losses Into Profits*, N.Y. TIMES, Apr. 22, 2016, http://www.nytimes.com/2016/04/24/business/fantasy-math-is-helping-companies-spin-losses-into-profits.html?_r=0 (last visited Mar. 7, 2019).

³ *Non-GAAP Financial Measures*, U.S. SECURITIES AND EXCHANGE COMMISSION (Apr. 4, 2018), <https://www.sec.gov/divisions/corpfin/guidance/nongaapinterp.htm#101> (last visited Mar. 7, 2019). To be sure, there are other situations where Regulation G would not apply but are not applicable here.

31. Thus, the C&DI makes clear that the so-called “business combination” exemption from the Regulation G non-GAAP to GAAP reconciliation requirement applies solely to the extent that a third-party, such as a financial advisor, has utilized projected non-GAAP financial measures to render a report or opinion to the Board. To the extent the Board also examined and relied on internal financial forecasts to recommend a transaction, Regulation G applies.

32. Thus, to bring the Proxy into compliance with Regulation G as well as cure the materially misleading nature of the forecasts under SEC Rule 14a-9 as a result of the omitted information, Defendants must provide a reconciliation table of the non-GAAP measures to the most comparable GAAP measures.

Financial Analyses

33. With respect to Barclays’s *Discounted Cash Flow* Analysis, the Proxy fails to disclose: (i) the line items used to calculate the Company’s unlevered free cash flows utilized by Barclays; (ii) the basis for Barclays’s selection of the range of discount rates of 14.5% to 16.0% including the assumptions for calculating the Company’s weighted average cost of capital; (iii) the basis for Barclays’s selection of the exit multiples of 9.0x to 11.0x; (iv) the Company’s cash net of debt as of March 30, 2019 as provided by Aquantia management; and (v) the number of fully diluted shares of Company common stock, adjusted for restricted stock units, performance stock units, and stock options, outstanding as of May 3, 2019.

34. In sum, the Proxy independently violates both: (i) Regulation G, which requires a presentation and reconciliation of any non-GAAP financial measure to their most directly comparable GAAP equivalent; and (ii) Rule 14a-9, since the material omitted information renders certain statements, discussed above, materially incomplete and misleading. As the Proxy independently contravenes the SEC rules and regulations, Defendants violated Section 14(a) and Section 20(a) of the Exchange Act by filing the Proxy to garner votes in support of the Proposed Transaction from Aquantia shareholders.

35. Absent disclosure of the foregoing material information prior to the special shareholder meeting to vote on the Proposed Transaction, Plaintiff will not be able to make a fully informed decision regarding whether to vote in favor of the Proposed Transaction, and she is thus

1 threatened with irreparable harm, warranting the injunctive relief sought herein.

2
3 **FIRST CAUSE OF ACTION**

4 **(Against All Defendants for Violations of Section 14(a) of the Exchange Act**
5 **and 17 C.F.R. § 244.100 Promulgated Thereunder)**

6 36. Plaintiff repeats and re-alleges each allegation set forth above as if fully set forth
7 herein.

8 37. Section 14(a)(1) of the Exchange Act makes it “unlawful for any person, by the
9 use of the mails or by any means or instrumentality of interstate commerce or of any facility of a
10 national securities exchange or otherwise, in contravention of such rules and regulations as the
11 Commission may prescribe as necessary or appropriate in the public interest or for the protection
12 of investors, to solicit or to permit the use of his name to solicit any proxy or consent or
13 authorization in respect of any security (other than an exempted security) registered pursuant to
14 section 78l of this title.” 15 U.S.C. § 78n(a)(1).

15 38. As set forth above, the Proxy omits information required by SEC Regulation G,
16 17 C.F.R. § 244.100, which independently violates Section 14(a). SEC Regulation G among other
17 things, requires an issuer that chooses to disclose a non-GAAP measure to provide a presentation
18 of the “most directly comparable” GAAP measure, and a reconciliation “by schedule or other
19 clearly understandable method” of the non-GAAP measure to the “most directly comparable”
20 GAAP measure. 17 C.F.R. § 244.100(a).

21 39. The failure to reconcile the numerous non-GAAP financial measures included in
22 the Proxy violates Regulation G and constitutes a violation of Section 14(a).

23 **SECOND CAUSE OF ACTION**

24 **(Against All Defendants for Violations of Section 14(a) of the Exchange Act**
25 **and Rule 14a-9 Promulgated Thereunder)**

26 40. Plaintiff repeats and re-alleges each allegation set forth above as if fully set forth
27 herein.

28 41. SEC Rule 14a-9 prohibits the solicitation of shareholder votes in registration
statements that contain “any statement which, at the time and in the light of the circumstances
under which it is made, is false or misleading with respect to any material fact, or which omits to

1 state any material fact necessary in order to make the statements therein not false or misleading.”
2 17 C.F.R. § 240.14a-9.

3 42. Regulation G similarly prohibits the solicitation of shareholder votes by
4 “mak[ing] public a non-GAAP financial measure that, taken together with the information
5 accompanying that measure . . . contains an untrue statement of a material fact or omits to state a
6 material fact necessary in order to make the presentation of the non-GAAP financial measure . . .
7 not misleading.” 17 C.F.R. § 244.100(b).

8 43. Defendants have issued the Proxy with the intention of soliciting shareholder
9 support for the Proposed Transaction. Each of the Defendants reviewed and authorized the
10 dissemination of the Proxy, which fails to provide critical information regarding, amongst other
11 things, the financial forecasts for the Company.

12 44. In so doing, Defendants made untrue statements of fact and/or omitted material
13 facts necessary to make the statements made not misleading. Each of the Individual Defendants,
14 by virtue of their roles as officers and/or directors, were aware of the omitted information but
15 failed to disclose such information, in violation of Section 14(a). The Individual Defendants were
16 therefore negligent, as they had reasonable grounds to believe material facts existed that were
17 misstated or omitted from the Proxy, but nonetheless failed to obtain and disclose such
18 information to shareholders although they could have done so without extraordinary effort.

19 45. The Individual Defendants knew or were negligent in not knowing that the Proxy
20 is materially misleading and omits material facts that are necessary to render it not misleading.
21 The Individual Defendants undoubtedly reviewed and relied upon the omitted information
22 identified above in connection with their decision to approve and recommend the Proposed
23 Transaction.

24 46. The Individual Defendants knew or were negligent in not knowing that the
25 material information identified above has been omitted from the Proxy, rendering the sections of
26 the Proxy identified above to be materially incomplete and misleading.

27 47. The Individual Defendants were, at the very least, negligent in preparing and
28 reviewing the Proxy. The preparation of a registration statement by corporate insiders containing

1 materially false or misleading statements or omitting a material fact constitutes negligence. The
 2 Individual Defendants were negligent in choosing to omit material information from the Proxy or
 3 failing to notice the material omissions in the Proxy upon reviewing it, which they were required
 4 to do carefully as the Company's directors. Indeed, the Individual Defendants were intricately
 5 involved in the process leading up to the signing of the Merger Agreement and the preparation of
 6 the Company's financial forecasts.

7 48. Aquantia is also deemed negligent as a result of the Individual Defendants'
 8 negligence in preparing and reviewing the Proxy.

9 49. The misrepresentations and omissions in the Proxy are material to Plaintiff, who
 10 will be deprived of her right to cast an informed vote if such misrepresentations and omissions are
 11 not corrected prior to the vote on the Proposed Transaction.

12 50. Plaintiff has no adequate remedy at law. Only through the exercise of this Court's
 13 equitable powers can Plaintiff be fully protected from the immediate and irreparable injury that
 14 Defendants' actions threaten to inflict.

15 **THIRD CAUSE OF ACTION**
 16 **(Against The Individual Defendants for**
Violations of Section 20(a) of the Exchange Act)

17 51. Plaintiff incorporates each and every allegation set forth above as if fully set forth
 18 herein.

19 52. The Individual Defendants acted as controlling persons of Aquantia within the
 20 meaning of Section 20(a) of the Exchange Act as alleged herein. By virtue of their positions as
 21 officers and/or directors of Aquantia, and participation in and/or awareness of the Company's
 22 operations and/or intimate knowledge of the incomplete and misleading statements contained in
 23 the Proxy filed with the SEC, they had the power to influence and control and did influence and
 24 control, directly or indirectly, the decision making of the Company, including the content and
 25 dissemination of the various statements that Plaintiff contends are materially incomplete and
 26 misleading.

27 53. Each of the Individual Defendants was provided with or had unlimited access to
 28 copies of the Proxy and other statements alleged by Plaintiff to be misleading prior to and/or

1 shortly after these statements were issued and had the ability to prevent the issuance of the
2 statements or cause the statements to be corrected.

3 54. In particular, each of the Individual Defendants had direct and supervisory
4 involvement in the day-to-day operations of the Company, and, therefore, is presumed to have
5 had the power to control or influence the particular transactions giving rise to the Exchange Act
6 violations alleged herein, and exercised the same. The Proxy at issue contains the unanimous
7 recommendation of each of the Individual Defendants to approve the Proposed Transaction. They
8 were thus directly involved in preparing the Proxy.

9 55. In addition, as the Proxy sets forth at length, and as described herein, the
10 Individual Defendants were involved in negotiating, reviewing, and approving the Merger
11 Agreement. The Proxy purports to describe the various issues and information that the Individual
12 Defendants reviewed and considered. The Individual Defendants participated in drafting and/or
13 gave their input on the content of those descriptions.

14 56. By virtue of the foregoing, the Individual Defendants have violated Section 20(a)
15 of the Exchange Act.

16 57. As set forth above, the Individual Defendants had the ability to exercise control
17 over and did control a person or persons who have each violated Section 14(a) and Rule 14a-9 by
18 their acts and omissions as alleged herein. By virtue of their positions as controlling persons,
19 these Defendants are liable pursuant to Section 20(a) of the Exchange Act. As a direct and
20 proximate result of Individual Defendants' conduct, Plaintiff will be irreparably harmed.

21 58. Plaintiff has no adequate remedy at law. Only through the exercise of this Court's
22 equitable powers can Plaintiff be fully protected from the immediate and irreparable injury that
23 Defendants' actions threaten to inflict.

24 **RELIEF REQUESTED**

25 **WHEREFORE**, Plaintiff demands judgment against Defendants as follows:

26 A. Preliminarily and permanently enjoining Defendants and their counsel, agents,
27 employees and all persons acting under, in concert with, or for them, from proceeding with,
28 consummating, or closing the Proposed Transaction, unless and until the Company discloses the

1 material information discussed above which has been omitted from the Proxy;

2 B. In the event that the proposed transaction is consummated, rescinding it and
3 setting it aside, or awarding rescissory damages;

4 C. Awarding compensatory damages against Defendants, individually and severally,
5 in an amount to be determined at trial, together with pre-judgment and post-judgment interest at
6 the maximum rate allowable by law, arising from the Proposed Transaction;

7 D. Awarding Plaintiff the costs and disbursements of this action and reasonable
8 allowances for fees and expenses of Plaintiff's counsel and experts; and

9 E. Granting Plaintiff such other and further relief as the Court may deem just and
10 proper.

11 **DEMAND FOR JURY TRIAL**

12 Plaintiff hereby demands a trial by jury.

13 DATED: May 30, 2019

**WOLF HALDENSTEIN ADLER
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